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SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 708

EDWARD A. KRAFT,
V. E. BARNES,
LUKE MUNZER, Individually, and
EDWARD A. KRAFT, V. E. BARNES, and LUKE MUNZER, Constituting the Remonstrating Committee of Residents and Freeholders Opposing Annexation to the City of Louisville, - - - - - Petitioners,

versus

CITY OF LOUISVILLE, - - - - Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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March, 1959.

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ON PETITION FOT WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

Petitioners are attempting to review two decisions of the Kentucky Court of Appeals, as follows:

City of Louisville v. *Kraft,* Ky., 297 S. W. 2d 39. Petition for Rehearing denied October 19, 1956.

Kraft v. *City of Louisville,* Ky., 317 S. W. 2d 161. Petition for Rehearing denied November 21, 1958.

JURISDICTION.

The petitioners are seeking a review not only of the judgment of the Kentucky Court of Appeals in *Kraft* v. *City of Louisville,* Ky., 317 S. W. 2d 161 (R. (2) 73), but also of the judgment of the Kentucky Court of Appeals in *City of Louisville* v. *Kraft,* Ky., 297 S. W. 2d 39 (R. (1) 773). Reference to "Opinions Below" will show that more than ninety days have elapsed since the final determination of the first Appeal.

Furthermore, petitioners claim jurisdiction on the ground that State Statutes and State Rules of Civil Procedure are repugnant to the Constitution of the United States. Petitioners' Argument, however, deals solely with the question of whether or not the Kentucky Court of Appeals acted constitutionally in applying State Statutes and States Rules of Civil Procedure.

ARGUMENT ON JURISDICTION.

It should be borne in mind that the first appeal was decided on October 19, 1956, and the petition for rehearing was denied on January 25, 1957.

This judgment was final and disposed of the merits on the entire case. It *directed* the entry of a specific judgment by the trial court. Examination of the first opinion (R. (1) 774) and the language of the opinion of the second appeal (R. (2) 74) confirms that the first judgment of the Court of Appeals was final, disposing of the entire case on the merits by the entry

of a specific judgment. The following language appears in the opinion of the second appeal:

> "On the former appeal of this case the judgment was reversed with directions to enter a judgment authorizing the City of Louisville to proceed with the annexation of certain territory known as the 'business district' of the Community of St. Matthews. See City of Louisville v. Kraft, Ky., 297 S. W. 2d 39.
>
> "These contentions are without merit because of the former appeal of this case the judgment was reversed with directions to enter a judgment authorizing the City of Louisville to annex the subject territory. City of Louisville v. Kraft, 297 S. W. 2d 39. Our Rules of Civil Procedure authorize this procedure. CR 50.02, see Clay, CR 50.02, Author's Comment No. 5; Coca-Cola Bottling Works of Lexington v. Bingham, Ky., 277 S. W. 2d 468. Hence, there was nothing else for the trial court to do but to enter that judgment."

In an almost identical procedural situation, this court in *Rio Grande Western Ry.* v. *Stringhouse,* 239 U. S. 44, 60 L. Ed. 136, 36 Sup. Ct. 5, held that where there were two appeals in the state court and on the first appeal the appellate court reversed the lower court and ordered the entry of a specific judgment, and thereafter there was a second appeal from the new judgment of the lower court entered in conformity with the judgment of the appellate court on the first appeal, the petition for certiorari on the second appeal presented nothing for review to the Supreme Court.

The following are quotations from that case, *id.* at 239 U. S. 47:

> "Being in doubt which of the judgments of the appellate court should be brought here for review to present properly the question respecting the nature of its title, the plaintiff concluded to bring up both, each by a separate writ of error. Manifestly the first judgment was final within the meaning of Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913 §1214]. It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court. Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73, 1 Sup. Ct. Rep. 15; Mower v. Fletcher, 114 U. S. 127, 29 L. Ed. 117, 5 Sup. Ct. Rep. 799; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. Ed. 1144, 22 Sup. Ct. Rep. 881. And as the question sought to be presented arises upon the first judgment—it being final in the sense of § 237—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here."

Hence, whatever complaint petitioners might have of the decision of the Kentucky Court of Appeals should have been addressed to this Court within ninety days after January 25, 1957, the date of the denial of his petition for rehearing on the first appeal. By sleeping on their right to apply for timely relief from this Court, the petitioners have abandoned their right for Supreme Court review. They are now unable to resurrect jurisdiction in the Supreme Court through

the spurious expedient of a second appeal to the Court of Appeals of Kentucky and thereafter by petition for certiorari from the judgment on the second appeal.

QUESTION PRESENTED.

As far as the federal question presented by petitioners is concerned, the City of Louisville emphatically denies that the Kentucky Court of Appeals in these cases placed constructions on State Statutes or Civil Rules at variance with former and contemporaneous constructions of those same statutes and rules.

STATUTES INVOLVED.

The statement of the petitioners on this point is accepted, and KRS 81.120 is included in our Appendix "A".

STATEMENT.

Since the petitioners have filed the original records with the Supreme Court, rather than a transcript, we will on occasion refer to the original transcripts of the record, where we are unable otherwise to identify the matter referred to. This reference will appear as Orig. R. (page number) or Orig. Sup. R. (page number). Where possible the record references employed by the petitioners will be used.

The statement of the petitioners is substantially correct except that the City of Louisville in the general election of November 6, 1956, did not submit to the

voters a proposal of annexation pursuant to KRS 81.120 Appendix "A", but rather the Fiscal Court of Jefferson County, pursuant to the new statute (enacted in 1956), KRS 81.300-81.360, submitted to the voters a Plan for the Improvement of Local Government in Jefferson County, which included a proposed extension of boundaries of the City of Louisville (Orig. Sup. R. 15B and original Exhibits "A" and "B" attached to that Response to Motions).

The statement of petitioner also fails to point out that the stipulation (R. (1) 96) contains *no* agreement:

(a) Not to make a motion for a directed verdict;

(b) Not to appeal.

FEDERAL QUESTION RAISED.

The writers of this brief have difficulty in understanding the Federal Question as presented by petitioners. We believe petitioners intend to say that the Court of Appeals of Kentucky has denied the equal protection of the laws to them by:

(a) Reversing a judgment of the lower court based on a jury verdict in the first appeal;

(b) Not ruling favorably on their motion for a new trial on the second appeal.

ARGUMENT ON MERITS.

This case involves the proposal by the City of Louisville to annex an area of approximately 70 acres. Subsequent to the initiation of the annexation proceedings, a new city was incorporated, known as St. Matthews, which by subsequent annexations annexed the territory proposed to be annexed by the City of Louisville. By two decisions here sought to be reviewed, the Kentucky Court of Appeals approved the annexation by Louisville and ousted the subsequent annexations by St. Matthews.

Annexation cases, dealing with the political status of territory within the several States, are normally not reviewable by the Supreme Court of the United States unless constitutional rights are otherwise infringed. This policy is admirably summarized in the case of *Forsyth* v. *City of Hammond,* 166 U. S. 506, 41 L. Ed. 1095, 17 S. Ct. 665, in which the court states, *id.* at 166 U. S. 518:

> "But there is another aspect of this case. The matter in controversy is one peculiarly within the domain of state control. Kelly v. Pittsburg, 104 U. S. 78 [26:658]. It is for the state to determine its political subdivisions, the number and size of its municipal corporations and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling. We do not mean to hold that in the creation or change of

municipal boundaries there may not be action taken by the state which involves a trespass upon rights secured by the Federal Constitution; or that in proceedings looking to such change no questions can arise which are of a federal nature, and in respect to which the judgment of the courts of the nation must be controlling. All that we mean to decide is that the matter of the territorial boundaries of a municipal corporation is local in its nature, and, as a rule, to be finally and absolutely determined by the authorities of the state. . . ."

The petitioners attempt to raise seven specific grounds on which their constitutional rights were allegedly infringed by the Court of Appeals of Kentucky in these annexation cases. We shall briefly answer the seven contentions listed in the petition for certiorari, pages 12-18, and show that there is no merit to any of these grounds. The arguments, following the order in the petition for certiorari, are:

(1) There was no "pre-trial stipulation for a verdict by jury" as stated by the petitioners. Examination of the stipulation by counsel (R. (1) 96) confirms that the pre-trial stipulation contained only the following three provisions:

(a) That the attorney for the plaintiffs (he is also attorney for the petitioners herein) represented a substantial number of the freeholders in the area proposed for annexation;

(b) The specific instructions to be given the jury on the trial of the case;

(c) An agreement that the City of Louisville in its argument to the court or the jury would make no argument to the effect that the attorney for the remonstrants did not represent a substantial number of individuals.

This stipulation was followed to the letter. Hence, the cited cases dealing with the repudiation of stipulations are irrelevant.

(2) The Kentucky Court of Appeals in prior decisions has held that in annexation cases of first class cities, where the remonstrants do not meet the burden of proof, a directed verdict by the court is proper. No jury finding is required. *Masonic Widows & Orphans Home and Infirmary* v. *City of Louisville,* 309 Ky. 532, 217 S. W. 2d 815 (1948); *City of Louisville* v. *Sullivan,* 302 Ky. 86, 193 S. W. 2d 1017 (1946). Since this procedure has become well established in the body of Kentucky law, the petitioners can claim no infringement of their constitutional rights because the Kentucky Court of Appeals followed prior precedents.

(3) The alternate method of rendering governmental services in Jefferson County which was submitted to the voters in 1956, pursuant to KRS 81.300 to 81.360, does not come within the scope of KRS 81.270 as contended by the petitioners. The cases which the petitioners cite are those in which there was a proposal to annex *by the City of Louisville.* That proposal by the City of Louisville may be by the method set out in KRS 81.100 and KRS 81.110 for unincorporated territory or a proposal by the City to annex incorporated

territory pursuant to KRS 81.120 (Appendix, page A-1). Under KRS 81.120 the proposal to annex an incorporated city, or part thereof, is made by the City of Louisville and submitted to the voters. An adverse vote by the voters of the territory bars any further proposal to annex that particular territory for five years pursuant to KRS 81.270.

The alternate method of rendering governmental services in Jefferson County, submitted to the voters in 1956, was a proposal to extend services submitted *by the Fiscal Court of Jefferson County, Kentucky* (KRS 81.300 and Orig. Sup. R. 15B and Exhibits "A" and "B" attached to that Response to Motions), rather than a proposal to annex by the City of Louisville pursuant to KRS 81.120.

Prior to the decision in the *Kraft* case, there had been no decision by the Kentucky Court of Appeals as to the application of KRS 81.270 on a proposal submitted pursuant to KRS 81.300-81.360. However, contemporaneous with the second appeal in the *Kraft* case, the same contention was made by the City of St. Matthews in *City of Louisville* v. *City of St. Matthews,* Ky., 316 S. W. 2d 210 (Appendix "D", page D-1). In that case, the Kentucky Court of Appeals ruled on this proposition for the first time and disposed of this contention with the following language:

> "Secondly, this action is, in effect, a collateral attack upon the judgment entered in the Kraft case on March 8, 1957. Inasmuch as the judgment of March 8, 1957, was final, Louisville may annex the territory in question under the judgment, not-

withstanding the fact that the voters of St. Matthews rejected the 'proposal' for Louisville to extend its boundaries and municipal services under KRS 81.300-81.360. In the circumstances, the trial court should have dismissed the instant action. . . ."

The cases cited by the petitioners are not contrary to the instant decisions since they dealt with a different situation and different statutes. The only Kentucky case dealing with KRS 81.300 to 81.360, *City of Louisville* v. *City of St. Matthews, supra,* is contrary to the position taken by the petitioners.

(4) The premise of this argument is that on the trial of the case on the first appeal, the City failed to state its grounds when it made a motion for a directed verdict, and that consequently a subsequent motion for judgment notwithstanding the verdict was improper. However, that premise is false; the motion for a directed verdict was supported by a statement of the grounds for the motion. If the transcript of the original record in the first appeal is examined at page 85, there will be found the affidavit of Herman E. Frick that he did specify the grounds for his motion for a directed verdict. This affidavit is supported by the affidavit of Henri L. Mangeot shown in the same transcript at page 83, and these affidavits are conclusively supported by the Memorandum of the learned Trial Judge, the Honorable Stephen S. Jones, found at page 88 of the original transcript of the record on the first appeal.

Since the grounds for the directed verdict were given at the time the motion was made, all the petitioners' discussion and cases relating to the failure to specify such grounds are irrelevant.

(5) It is true that the attorney for the City of Louisville did not object to the instructions given to the jury and we never have and do not now object to the instructions given. Those instructions were correct.

Certainly, by agreeing to the instructions to be given the jury (R. (1) 96), we did not give up our right to make a motion for a directed verdict or our right to appeal.

At the time of the trial, the attorney for the petitioners did not feel that the stipulation prevented his making a motion for a directed verdict. (See the transcript of the original record in the first appeal, page 63.) If he felt that the stipulation did not prevent his making a motion for a directed verdict, he can not now reasonably contend that the same stipulation prevented us from making a similar motion.

(6) Examination of the original supplemental record herein, page 22, reveals that the petitioner made his motion for a new trial. This motion for a new trial was overruled by the trial court *after argument thereon* at page 25 of the supplemental record herein. The Court of Appeals on the second appeal of this case held that there was no merit to the petitioners' motion for a new trial. Therefore, the petitioners made the motion for a new trial, were heard on that motion, and that motion was overruled on the ground that there was no merit to their contention.

(7) Since annexation cases are cases which involve solely the political status of territory, 2 McQuillin, Municipal Corporations, § 7.10 (3d ed., 1949), there is no monetary amount in controversy. Therefore, the statute relating to monetary jurisdiction of the Kentucky Court of Appeals is irrelevant. This is especially true in the light of KRS 81.110, which specifically grants an appeal in annexation cases of first class cities.

THE INSTANT CASE IS NOW PROBABLY MOOT.

Annexation proceedings for first class cities in Kentucky, pursuant to KRS 81.100 and 81.110, require first an ordinance proposing annexation, a thirty-day waiting period in which a remonstrance suit against the proposed annexation may be filed, and a provision that when a judgment is entered authorizing the annexation, an annexing ordinance may be passed. The annexation is complete upon the passage of the annexation ordinance. The City of Louisville, pursuant to the judgment of the lower court after the first appeal, annexed the territory here involved by Ordinance No. 93, Series 1957.

By a declaration-of-rights suit the City of St. Matthews questioned the validity of the annexation of this territory by the City of Louisville. The Kentucky Court of Appeals found that the annexation ordinance (as distinguished from the proposing ordinance) was valid and adjudged the territory to be part of the City of Louisville. *City of Louisville* v. *City of St. Matthews*, Ky., 316 S. W. 2d 210. The petition

for rehearing of the latter case was denied by the Kentucky Court of Appeals on October 17, 1958. No petition for certiorari from the latter judgment was filed in this Court. The judgment of the Court of Appeals in *City of Louisville* v. *City of St. Matthews, supra,* is absolutely final. The territory is now part of the City of Louisville.

The present review is directed to litigation of the ordinance proposing annexation of the disputed territory. In view of the finality of the judgment in *City of Louisville* v. *City of St. Matthews, supra,* that the disputed territory is now part of the City of Louisville, a reversal of the litigation directed to the proposing ordinance would be of uncertain consequence. (14 Am. Jur., Courts, § 49, p. 277 (1938), and cases there cited on mootness.)

PETITIONERS' USE OF APPENDIX.

Petitioners have seen fit to include in their Appendix not only the opinions of the court below, but also the petitioners' petitions for rehearing. In the interest of fairness we have included in our Appendix our Responses to their petitions for rehearing. In the event this Court deems any part of the petitions for rehearing worthy of consideration, we should appreciate the Court's reading our response to that petition for rehearing.

CONCLUSION.

The petitioners by failing to file a timely petition for rehearing after the final judgment of the Kentucky Court of Appeals, disposing of the entire case on the merits on the first appeal have lost their right to review in this Court.

In any event, analysis of the merits of the constitutional questions, raised in the petition for rehearing, reveals that they are without substance.

Lastly, in view of the final determination of the status of this particular territory in another independent and invulnerable decision of the Kentucky Court of Appeals, a serious question exists of the consequence of any reversal of the two cases here sought to be reviewed.

The petition for certiorari should be denied.

Respectfully submitted,

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